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No. 83-1598

Office - Supreme Court, U.S.

FILED

JUN 14 1984

ALEXANDER L. STEVAS.

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# In the Supreme Court of the United States

October Term, 1983

WILLIAM C. WISWELL,  
*Petitioner,*

vs.

STATE OF KANSAS,  
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF KANSAS

## RESPONDENT'S BRIEF IN OPPOSITION

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## **QUESTIONS PRESENTED**

- 1) Whether the Supreme Court has jurisdiction to consider this case?
- 2) Whether further Supreme Court guidance is needed on the standard of effective assistance of counsel?
- 3) Whether the Kansas appellate courts have applied a constitutionally permissible test of effective assistance of counsel?



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**RESPONDENT'S BRIEF IN OPPOSITION**

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The respondent, State of Kansas, respectfully requests that this Court deny the petition for writ of certiorari.

**JURISDICTION**

The petitioner asserts jurisdiction pursuant to Title 28, United States Code, §1257(3). Evidently, the petitioner relies on that portion of the statute referring to a right set up or claimed by the Constitution, the Sixth Amendment's right to effective assistance of counsel. Further examination of the petition's reasons for granting review reveals that the petitioner's real complaints are that there exists in the law hazy, ill-defined standards of competency; Kan-

sas appellate courts improperly rely on the totality of circumstances test and have ignored *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973), 624 F.2d 196 (D.C. Cir. 1976) and the American Bar Association's Standards for Criminal Justice. The petitioner did not raise the preceding issues at the state court level. Thus, although a federal question may be involved, the petitioner has not raised the issues in a proper time and place and this Court is without jurisdiction.

Supreme Court decisions have long been consistent and clear that federal questions must be raised and decided by the state court below before the Supreme Court has jurisdiction. *Maxwell v. Newbold*, 59 U.S. 511 (1856); *Baldwin v. Kansas*, 129 U.S. 52 (1889); *Herndon v. Georgia*, 295 U.S. 441 (1935); *Homes Ins. Co. v. Dick*, 281 U.S. 397 (1930); *Honeymoon v. Hanan*, 30 U.S. 14 (1937); and *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

A review of the Kansas Court of Appeals' decision, *State of Kansas v. Wiswell*, No. 54,873 (Kan. October 6, 1983), found in the petition, reveals that the only questions presented and decided in this case were an evidentiary question and whether the trial judge abused his discretion in rejecting the claim the defendant was denied effective assistance of counsel. The issues in the petition outlined above were not raised or decided at the state court level.

Therefore, because petitioner's issues were not raised and decided below, this Court does not have jurisdiction.

## REASONS FOR DENYING THE WRIT

Convicted criminal defendants have increasingly carried the torch of "ineffective assistance of counsel" claims to appellate courts. The petitioner is one of these defendants. The petitioner basically argues that there are unclear legal standards as to effective assistance of counsel and that the Kansas courts have improperly reviewed such complaints. Finally, he requests guidance of the Supreme Court to state appellate courts on this general issue. In the light of two extremely recent Supreme Court decisions, *United States v. Cronin*, 52 U.S.L.W. 4560, No. 82-660 (May 14, 1984), and *Strickland v. Washington*, 52 U.S.L.W. 4565, No. 82-1554 (May 14, 1984), and the history of Kansas law on the subject, the petition is without merit, in fact and law, and must fail even if the Court finds it has jurisdiction.

*Strickland* held that the proper standard for attorney performance is that of "reasonably effective assistance". *Strickland*, 52 U.S.L.W. at 4570. The latter standard was not a deviation from past Supreme Court decisions, but was in keeping with the standard expressed in *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). If the Court would grant writ of certiorari in this case and adopt some new test offered by the petitioner, it would only serve to create confusion on an issue that has now been clearly clarified.

Kansas has been applying the constitutional test of "reasonably effective assistance" for several years. Petitioner cites *Schoonover v. State*, 218 Kan. 377, 543 P.2d 881, cert. denied 424 U.S. 944 (1976), but neglects to mention in his reasons for granting review the precise and scholarly decision of *Schoonover v. State*, 2 Kan. App. 2d 481, 582 P.2d 292, rev. denied 225 Kan. 845 (1978).



In the latter decision, the appellant unsuccessfully argued that there had been a change in the law on the effective assistance of counsel in *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973). The Kansas Court of Appeals held that *DeCoster* was not a "new" standard but indeed had "been applied in Kansas for many years." *Schoonover*, 2 Kan. App. 2d at 485.

*Strickland* stated that, "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances". *Strickland*, 52 U.S.L.W. at 4570. *Strickland* also indicated the ABA Standards for Criminal Justice are only guides. Similar to applying the "reasonably effective assistance" test standard, the Kansas appellate courts have properly reviewed the assistance of counsel under the microscope of "totality of circumstances" test. In addition, the Kansas courts have correctly used the ABA Standards as guides. *Schoonover*, 2 Kan. App. 2d at 484.

The Kansas legal exposition for all of the above, which was applied in this case, reads:

2. CONSTITUTIONAL LAW - Right to Effective Assistance of Counsel. The right to effective assistance of counsel presupposes that counsel will be competent and capable of conducting a genuine defense on behalf of the accused. While the law does not guarantee the assistance of the most brilliant and experienced counsel, it does require honest, loyal, genuine and faithful representation on the part of counsel, be he retained or appointed.

3. SAME - Right to Effective Assistance of Counsel - Conduct which Deprives Defendant of Effective Counsel. Conduct of defense counsel which is so dishonest,

incompetent or inadequate as to amount in practical effect to no counsel at all clearly violates a defendant's Sixth Amendment right to counsel. However, conduct which amounts to a substantial deviation from that expected of a reasonably competent lawyer in the community, such that no lawyer of average ability would engage in it, and which causes the client's conviction or otherwise works to the client's substantial disadvantage, is also a deprivation of the constitutional guarantee of "effective" counsel.

4. SAME - Right to Effective Assistance of Counsel - Totality of Counsel's Representation Considered. In applying the foregoing standard to counsel's performance, the effective assistance of counsel cannot be equated with the successful assistance of counsel. The adequacy of an attorney's services on behalf of an accused must be gauged by the totality of his representation, not by fragmentary segments analyzed in isolated cells. *Schoonover v. State*, 2 Kan. App. 2d 481, Syl. ¶ 1, 2, 3 and 4.

Using sound logic Justice O'Connor wrote in *Strickland* that "more specific guidelines" than "reasonableness" under professional norms are "not appropriate". *Strickland*, 52 U.S.L.W. at 4570.

Thus, petitioner's claim that competency is ill-defined and that further guidance is needed from the Supreme Court flies in the face of extremely recent Supreme Court decisions and Kansas case law.

The petitioner, and all criminal defendants, must accept the fact that there is no precise acid test of determining the effectiveness of counsel given the many variables surrounding each case. The reasonably effective assistance under the totality of circumstances review is the

best invention of insuring that the Sixth Amendment is followed.

This issue of effectiveness was indeed the subject of a "second trial". See, *Strickland*, 52 U.S.L.W. at 4571. The post-trial motion on this issue was followed by a three-day evidentiary hearing before the trial judge. That hearing was then reviewed with approval by the Kansas Court of Appeals. This petition further unnecessarily bleeds the judicial system of time and resource. The proper standard of effectiveness has been applied and followed to insure that the defendant received the Sixth Amendment's goal of a fair adversarial trial.

Moreover, the petitioner has failed to demonstrate any error that caused prejudice which necessitates Supreme Court review. See, *Strickland*, 52 U.S.L.W. at 4571, 4572. Specifically, the petitioner is asking that the Court "infer" that he received ineffective assistance because of his attorney's illness. Inferring ineffectiveness of assistance was specifically rejected in *U. S. v. Cronin*, supra.

In sum, the standard of effective assistance is not hazy or ill-defined but is one word "reasonable". The Kansas Courts properly review such claims, using the Supreme Court approved concept of "reasonable" under the "totality of circumstances". Kansas has not sidestepped *DeCoster* or the ABA Standards but has incorporated their guidance in its review. Finally, no further guidance in this area is appropriate or needed from the Supreme Court.

### CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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